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On "The Constitution and the Moral Order"

By EDWIN J. DELATTRE*

In his essay, *The Constitution and the Moral Order*,¹ Professor Bennett reminds us that *eunomia*, the health and freedom of a society and the well-being of its system of laws, "depends on a regard throughout the society for the values the laws express and out of which they emerge."² He urges that these values must be nurtured, generated, and regenerated by and within the lives, the daily practices, and the conduct of the citizens themselves. While he agrees with Professors Freund and Meiklejohn that the Supreme Court can give us instruction about our best purposes, he recalls to us Justice Frankfurter's observation that the "ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law."³

In my remarks, I hope to highlight the intimacy of the connection among these points, to provide some further considerations in support of them, and to offer some reminders about important features of moral instruction in practice.

Neither law, documents, legal sanctions, nor government can secure freedom, order, and civility in interpersonal relations for a morally bankrupt or insensitive people. As Reinhold Niebuhr argued, "Consistent egotists would, of course, wreck any democratic process; for it requires some decent consideration of the needs of others."⁴ Like Niebuhr, Socrates argued that the quality of life in society and the well-being of the laws depends on the quality, the virtue, of the citizens. He brought this argument to life in his refusal to escape prison despite Crito's urgent pleas that he take advantage of the bribed guards and flee. Socrates recognized that by wilfully violating laws to which he

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1. Bennett, *The Constitution and the Moral Order*, 3 HASTINGS CONST. L.Q. 899 (1976) [hereinafter cited as Bennett].

2. *Id.* at 903.

3. *Id.* at 916 (quoting *Dennis v. United States*, 341 U.S. 494, 555 (1951) (Frankfurter, J., concurring)).

4. R. NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 151 (1944).

had assented throughout his life, merely for the sake of personal gain or convenience, he would advocate in principle the destruction of law itself and thereby the destruction of the well-being of the society in which his children would grow up. Perhaps even more important than the principle is the fact that the citizen is a teacher by example; Socrates was unwilling to be an example of disrespect for law.⁵

Niebuhr and Socrates trod a philosophical high ground, but their principles are equally applicable to more mundane affairs. My own work with police and law enforcement personnel,⁶ for example, has revealed the great extent to which police calls require keeping the peace between people who have become uncivil over some real or imagined offense. Frequently, no law has been broken; the police keep the peace by the very fact of their presence, which provides a kind of substitute for civility. There are clearly limits to how much can be done by such measures, and accordingly, much of the quality of daily life depends thoroughly on the reasonableness, restraint, and self-control of the citizens. Law enforcement agencies might promote a semblance of order despite widespread incivility; indeed, even terrorists might manage that, but we would never confuse such order with *eunomia*.⁷

The same point emerges in consideration of people who have no respect for the values the law expresses, or at least no respect so far as those values require guarding the rights and interests of people other than themselves. When this happens, the law and the sanctions of the law serve only as counsels of prudence to disobey the law cleverly, with intelligence and judgment. Such attitudes obviously cannot foster *eunomia*; they can jeopardize and, if sufficiently widespread, prevent it. Those who would attempt to contribute to *eunomia* must heed Socrates' example.

If it is true, as Bennett argues and I believe, that public virtue is indispensable to the health and freedom of a society and the well-

5. PLATO, *Crito*, in *THE COLLECTED DIALOGUES OF PLATO* 27 (E. Hamilton & H. Cairns eds. 1961).

6. During the spring of 1976, I taught a course entitled "Ethics and Law Enforcement" at the University of Toledo, Ohio. Of the sixty-seven students in two sections, fifty-nine were police officers, command personnel, or members of related criminal justice agencies. The course centered on applied ethics, and discussions in class primarily concerned actual situations that police considered to be morally important or problematic. I also had the opportunity to spend time with police personnel while they were on duty, an experience which I found to be highly instructive.

7. L. FULLER, *THE MORALITY OF LAW* (1964) [hereinafter cited as FULLER]. "Now it is plain that a semblance of 'public order' can be created by lawless terror, which may serve to keep people off the streets and in their homes." *Id.* at 107.

being of its laws, then the nurture of virtue and the passing on of what Lippmann calls "our great traditions of civility,"⁸ are important goals. Values of the sort Bennett regards as necessary to make the constitutional order and the moral order coincide must be fostered, for they are surely not innate.

The extent to which the Supreme Court or any other visible public exemplar can contribute to the general ethical welfare seems to me largely contingent on the immediate features of daily life and heritage. It is difficult if not impossible for any court to give instruction at a distance about ideals to people who have been deprived of intimacy with moral principles and ideals of virtue in the experiences of daily life. People whose moral and cultural heritage has been neglected or annihilated by the daily conduct and examples of their immediate elders, heroes, and peers are not likely to be very sensitive to abstract or remote ideals and principles. Above all, the young learn to take certain things seriously because those things are taken seriously by people of stature in their lives, and usually not because of arguments or reasons offered in their behalf. The criticism of values and the reflective appraisal of value claims that emerge with personal maturity presuppose this initial immediacy and the actual application of the professed values. Reflection about values does not arise in a moral vacuum. Nothing can become an important moral problem or issue for someone who has no inheritance of relevant values or who has received no instruction about the importance of morality and virtue.

The courts, like those who govern and those who represent, can be instructive through the quality and circumspection of their deliberations and decisions. They can serve as models of reasoned articulation. Such models are important because, as Fuller notes, "Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts."⁹ Nonetheless, the model will be viewed as exemplary only by people who pay attention to such matters, and who appreciate the significance of thoughtful deliberation and judgment based on inherited values, because they recognize the hazards of moral and intellectual arrogance. The basic springs of moral and intellectual humility—awareness that mere conviction or mere sincerity cannot by itself justify conduct or belief—must be nurtured not only by personal intimacy with virtue, but with very great patience. It is the citizens who embody, display, and

8. W. LIPPMANN, *THE PUBLIC PHILOSOPHY* 3 (Little, Brown ed. 1955).

9. FULLER, *supra* note 7, at 159.

nurture these values in practice or who fail to do so—the citizens as citizens, as parents, as teachers, as students, as employers, as employees, and as friends.

A brief story may help to illustrate these general points about nurture. I recall once putting a note on a garbage can cautioning the collector that there was broken glass inside. Our daughter, who could not then read, asked what I was doing, and I told her, explaining that I did not want the garbage collector to get hurt. She asked me if he was my friend; I told her I had never met him. She then said, not in surprise but in confirmation, "But you don't want him to get hurt anyway." This is the kind of experience in which a later and more conscious sense of respect for persons, for example, takes root.

The importance of the values of the citizenry to the health and freedom of a society and the well-being of its laws can be illustrated by an analogy between social life and a rule-bound game. In such a game, violation of its constitutive rules, cheating, destroys the game. The rules may be enforced rigidly, but ultimately whether the game is worth the candle depends on whether the participants consider it worthy of themselves to violate those constitutive rules. Life in society is not a game, and we cannot refuse or cease to participate in it, as we can in a game, short of complete abdication by suicide. Still, the quality of life in society depends in large measure on the ideals the citizens consider to be worthy of their allegiance in daily life and the behavior they think worthy of themselves. If a majority does not act on the values Bennett catalogues, that quality of life is greatly diminished.